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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 117

A. ED. WALLACE, JR.,

Petitioner,

VS.

ALBERT B. WALLACE,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Jonesboro, Georgia 30236

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OPINION BELOW

The opinion of the Supreme Court of Georgia, set forth in the appendix to the petition, pp. 9-25, is reported at 225 Ga. 102 (1969).

JURISDICTION

Petitioner seeks review by certiorari under 28 U.S.C. § 1257(3) on the ground that a right, privilege and immunity

under the United States Constitution has been claimed. More specifically, Petitioner alleges that the "due process" clause of the Fourteenth Amendment in connection with his ineligibility to hold the office of District Attorney because of his failure to meet the requirements of the Georgia Constitution and statute law.

QUESTIONS PRESENTED FOR REVIEW

1. Was the Petitioner in fact notified of the requirements of registration with and payment of a license fee to the State Bar of Georgia?

2. Should certiorari be granted where the only federal question involved was raised for the first time in Motion for Rehearing and was never passed upon by the Supreme Court of Georgia?

3. Is Petitioner's application for certiorari moot because a new election was called and held and the victor assumed the office and is now serving as District Attorney?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are adequately set forth in the petition.

STATEMENT OF THE CASE

In general, the petitioner's statement is accurate. However, an additional statement is necessary in some

respects. Initially, the entire defense of the Petitioner was founded on alleged violations of the Georgia Constitution and not the Constitution of the United States. As admitted in the petition (p. 4), the only federal constitutional question was raised on the Motion for Rehearing filed by petitioner in the Supreme Court of Georgia after the initial decision by that Court. Nowhere in the Supreme Court of Georgia opinion can be found any decision on or discussion of any federal question. Secondly, the petitioner fails to mention that he made inquiry of the State Bar of Georgia to what was necessary to become an active member in good standing in April, 1967, and he was notified of the requirements by letter that same month. (T.8,20).[1] Notwithstanding this notice, he swore on June 4, 1968, that his failure to pay the license fee and register were "unintentional and an oversight and that the deponent was unaware of the requirement that required said dues to be paid, and that deponent was further unaware that said rule required same to be paid was in effect an (sic) existence." (T-19) Thirdly, an order on remittitur was entered by the lower Court on March 6, 1969, making the decision of the Supreme Court the order of the lower Court. Pursuant to this affirmance, the lower Court on March 10, 1969, ordered a special election to be held to fill the office of District Attorney in the Clayton Judicial Circuit. See Appendix. This election was held on May 3, 1969, the victor assumed the office and has exercised the functions of District Attorney ever since. Petitioner was notified of all of the above orders and events, yet did nothing to preserve any rights he may have had.

ARGUMENT

I. WAS THE PETITIONER IN FACT NOTIFIED OF THE REQUIREMENTS OF REGISTRATION WITH AND PAYMENT OF A LICENSE FEE TO THE STATE BAR OF GEORGIA?

The Petitioner apparently contends that he was deprived of "due process" because of his failure to receive any notice of the requirement that he register with and pay a license fee to the State Bar of Georgia beginning in 1964. The Georgia law is that all persons are presumed to know the law, even with regard to criminal statutes. *E.g., Levar v. State*, 103 Ga. 42, *Frazer v. State*, 112 Ga. 13. The Georgia Code (§ 102-105) has always provided that "ignorance of the law excuses no one." An attorney, by definition, gives advice as to what the law is and his profession is to know the law. The Petitioner sought the office of District Attorney, who represents the state and people of Clayton County, Georgia, against the criminal element. How ironic, then that an attorney seeking to represent all of the people of one of Georgia's largest counties should argue that his ignorance of the law concerning his own profession excuses him.

But, pretermitting the question of his knowledge of the law, the record here clearly shows that he was notified of the requirements and sent the proper form in April, 1967. But it was not until June, 1968, that he complied with the necessary legal provisions. (T-8,20) Thus, contrary to his contention, Petitioner was notified of the State Bar of Georgia and its requirements for the lawful practice and cannot be heard now to complain to the contrary. He also shows no reason for his failure that might have required a hearing. The Supreme Court of the United States should not concern itself with what is essentially a minor factual dispute.

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1. The respondent does not have available the paginated certified record in this case. Consequently, Respondent's references to page numbers are to the page numbers of the Transcript of Evidence (e.g., T-8) as prepared for the Supreme Court of Georgia.

II. SHOULD CERTIORARI BE GRANTED WHERE THE ONLY FEDERAL QUESTION INVOLVED WAS RAISED FOR THE FIRST TIME IN MOTION FOR REHEARING AND WAS NEVER PASSED UPON BY THE SUPREME COURT OF GEORGIA?

The federal question allegedly raised here was not presented either in the trial court or in the Supreme Court of Georgia until, by Petitioner's own admission, the motion for rehearing. (Petition, p. 4) It has long been the rule that a question not properly raised, litigated or passed upon below will not be reviewed on certiorari. *McCullough v. Kammerer Corp.*, 323 U.S. 327. The question could certainly have been raised in the Georgia Supreme Court but the Petitioner simply failed to do so; another situation that provides no ground for review. See, *Beck v. Washington*, 369 U.S. 541. Every appellate court, including the Supreme Court of the United States has wisely ruled that it will not pass on question not raised below. *Nelson v. County of Los Angeles*, 362 U.S. 1; *Adler v. Board of Education*, 342 U.S. 485.

The only constitutional questions raised in the trial court concerned the Georgia Constitution. The only constitutional questions raised or passed upon in the Supreme Court of Georgia concerned the Georgia Constitution. The supposed federal question here presents nothing for review.

III. IS PETITIONER'S APPLICATION FOR CERTIORARI MOOT BECAUSE A NEW ELECTION WAS CALLED AND HELD AND THE VICTOR ASSUMED THE OFFICE AND IS NOW SERVING AS DISTRICT ATTORNEY?

Lastly, the question raised by the petition is moot. The affirmance of the Supreme Court of Georgia was made the opinion of the lower Court. That court called a new election,

the election has been held, and the new District Attorney is now representing the people of Clayton County. All of this was done with notice to Petitioner. See Appendix. Yet he sat idly by and let these events transpire, notwithstanding his right to apply for superseadas in the Supreme Court of the United States. Under these circumstances, the election having been held and the person involved admitted to office, Petitioner's alleged deprivation of rights is moot. *Richardson v. McChesney*, 218 U.S. 487.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

/s/ Charles J. Driebe

CHARLES J. DRIEBE
Attorney for Respondent

Box 975
Jonesboro, Georgia 30236

APPENDIX

IN THE SUPERIOR COURT OF CLAYTON COUNTY
STATE OF GEORGIA

ALBERT BAILEY WALLACE,	:	CIVIL ACTION FILE NUMBER
PLAINTIFF	:	
VS.	:	
A. ED WALLACE, JR.,	:	
DEFENDANT	:	11,438

ORDER

The Defendant, A. ED WALLACE, JR., (also known as ALBERT E. WALLACE) having been found by this Court to be ineligible for the office of District Attorney for the Clayton Judicial Circuit (formerly the office of Solicitor General) and such finding of ineligibility having been affirmed by the Supreme Court of Georgia and order entered on remittiture from that Court, the General Election of November 5, 1968, is hereby declared invalid only insofar as the office of District Attorney of Clayton Judicial Circuit (formerly Solicitor General) is concerned; and

IT IS HEREBY ORDERED that a special election be held to fill the office of District Attorney of the Clayton Judicial Circuit and that the Ordinary of Clayton County is hereby ordered to call said special election as required by law.

This 10th day of March, 1969.

Order prepared by:
Charles J. Driebe,
Attorney for Plaintiff

Claude Shaw, Judge Fulton Superior Court, Presiding in Clayton Superior Court

cc: Mr. George Finch
Attorney for Defendant
Hon. H.W. Roberts, Ordinary
Clayton County, Georgia

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the foregoing upon counsel for the petitioner, Messrs. Wesley R. Asinof, 3424 First National Bank Building, Atlanta, Georgia 30303 and George G. Finch, Fulton National Bank Building, Atlanta, Georgia 30303, by depositing a copy of same in the United States mail, properly addressed and postage prepaid.

This is to further certify that all parties required to be served have been served.

This 31st day of October, 1969.

CHARLES J. DRIEBE